IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 944 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

City of Chicago, a Municipal Corporation, petitioner herein, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Illinois entered on December 17, 1951 (R. 41-42).

A previous judgment had been entered on May 18, 1950 (R. 29-30), but, upon certiorari granted by this Court (341 U. S. 913-914, 95 L. ed. 1349-1350), said judgment was vacated and the cause remanded to the Supreme Court of Illinois with directions to clarify whether said judgment rested on an adequate and independent State ground, or

whether the decision of a Federal question was necessary to the judgment rendered (R. 37-38).

Pursuant to the mandate of this Court on its grant of certiorari, the Supreme Court of Illinois, on December 17, 1951, entered a new (although similar) final judgment (R. 41-42), and, on the same day, filed a clarification of the ground or basis of said judgment (R. 39-40).

Opinions Below.

The opinion rendered by the Supreme Court of Illinois, prior to the grant of certiorari by this Court, is included in the Printed Transcript of the Record (R. 22-29); is set forth in full in Appendix A hereto, pp. 29-38; and is officially reported in 406 Ill. 286, 94 N. E. (2d) 195.

The text of the order of this Court granting certiorari, vacating the judgment, and remanding the cause for clarification of the ground of decision, is set forth in Appendix B hereto, p. 38; and is officially reported in 341 U. S. 913-914; 95 L. ed. 1349-1350.

The mandate issued out of this Court upon its grant of certiorari is included in the Printed Transcript of the Record (R. 37-38).

The clarifying opinion rendered and filed by the Supreme Court of Illinois on December 17, 1951, pursuant to the mandate of this Court, also appears in the Printed Transcript of the Record (R. 39-40), and is set forth in Appendix C hereto, pp. 39-40.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner seeks a review of the final judgment of the Supreme Court of Illinois (R. 41-42), holding unenforceable as against respondent corporation, on the sole ground of its being obnoxious to the commerce clause of the Federal Constitution (R. 39-40), an ordinance of the City of Chicago levying an occupation tax upon all persons engaged in the transportation of freight by horse-drawn or automotive vehicle for hire or reward within the city (R. 5-7). The amount of the tax ranged, for horse-drawn vehicles, from a minimum of $2.75 annually for each one-horse vehicle to a maximum of $13.75 annually for each six-horse vehicle, and, for automotive vehicles, from a minimum of $8.25 annually for each vehicle of not more than two-ton capacity to a maximum of $16.50 annually for each vehicle exceeding six-ton capacity, and was imposed in respect of each vehicle used or operated in such "within the city" transportation (R. 6).

The ordinance in question is Chapter 163 of the Municipal Code of Chicago, and was enacted by the City Council of the City of Chicago on January 14, 1949 (R. 5-7). Its official text may be found in the Journal of the Proceedings of the City Council of the City of Chicago, Illinois, for January 14, 1949, at page 3679, and its provisions are also set forth *verbatim* in Appendix D hereto, pp. 41-43.

Respondent corporation transports freight by motor vehicle both in interstate and intrastate commerce. Its intrastate operations include both intercity transportation (*i.e.*, to and from points within the City of Chicago from and to points outside the city but within the state), and intracity transportation (*i.e.*, where the points of origin and

destination are both within the corporate limits of the City of Chicago (R. 8). Respondent refused to comply with the ordinance (R. 8.), and petitioner instituted a quasi-criminal action in the Municipal Court of Chicago, charging respondent with engaging in the intracity transportation of freight by motor vehicle without a license, in violation of the ordinance (R. 1). A jury was waived (R. 2), and, upon a trial of the issues by the court without a jury, the respondent was found not guilty and ordered discharged (R. 2). The trial judge certified that the validity of a municipal ordinance was involved (R. 2-3), and a direct appeal was taken by the City of Chicago to the Supreme Court of Illinois (R. 3).

Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as an impermissible interference with the Federal commerce power on the sole ground that respondent's interstate and intrastate (including intracity) operations were inseparable (R. 29). Inseparability was held to have been established by a showing that respondent's vehicles carried mixed loads (*i.e.*, that the same vehicles carried both interstate and intrastate packages and parcels at the same time for the same or different shippers), and that respondent did not keep separate records of its interstate and intrastate operations or of its respective revenues therefrom (R. 23, 26-27, 29).

Moreover, this factor of "inseparability" was held sufficient, without more, to render the ordinance violative of the commerce clause of the Constitution of the United States, although there was no showing whatever that the tax levied by the ordinance would or did in practical effect impose an undue burden upon respondent's interstate operations (R. 29). Inasmuch as the Supreme Court of Illinois recognized that the burden of proving invalidity of

the ordinance under the commerce clause was upon the respondent (R. 26),—and this is, indeed, the true rule (*Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21, 27; 48 L. ed. 325),—the decision of the Supreme Court of Illinois is tantamount to a holding that a showing of undue burden in fact either is not required or flows inexorably from a mere showing of inseparability. This, we respectfully submit, constitutes an erroneous ruling upon an important and substantial Federal question, and brings this case within the certiorari jurisdiction of this court.

Thus far, we have referred only to the opinion rendered by the Supreme Court of Illinois prior to the grant of certiorari by this Court (R. 22-29). The clarifying opinion filed by the Supreme Court of Illinois, pursuant to the mandate of this Court after the grant of certiorari, makes it crystal clear that the decision of a Federal question was necessary to the judgment here sought to be reviewed (R. 39-40).

JURISDICTIONAL STATEMENT.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity

is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U. S. C. A., Title 28, Sec. 1257 (3).)

A municipal ordinance has been held to be a "State statute" within former Section 344 of Title 28, from which the foregoing provision is derived. (*Jamison* v. *Texas*, 318 U. S. 413, 414; 87 L. ed. 869; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 102-114; 72 L. ed. 801.)

It appears from the main opinion of the Supreme Court of Illinois (R. 22-29), that the earlier judgment of that court (R. 29-30) was based upon its holding that the ordinance in question violated the commerce clause of the Federal Constitution and was, therefore, invalid and unenforceable as against the respondent. The opinion stated that, in view of the decision on the interstate commerce question, "it is not necessary to consider the other arguments made" (R. 29).

The supplemental clarifying opinion, which was filed by the Illinois Supreme Court pursuant to this Court's mandate after granting certiorari, expressly declares that the basis for the present judgment is the court's conclusion that the commerce clause of the Federal Constitution prevents a municipal tax, otherwise valid because levied in respect of local commerce only, from being applied to respondent's purely local cartage operations because, and only because, they are inseparably linked with respondent's interstate business (R. 39-40).

The case arose upon the filing of a quasi-criminal complaint by the City of Chicago in the Municipal Court of Chicago charging the respondent with engaging in the occupation of transporting freight by motor vehicle within the city without having first obtained or paid for a license,

in violation of Chapter 163, Municipal Code of Chicago, which is the ordinance involved (R. 1, 14). The cause was heard by the trial court without a jury (R. 2). The parties filed a stipulation (R. 4-10) which, with certain oral testimony of the executive vice president of the respondent company (R. 11-13), constitutes the entire evidence in the case.

It appears from the evidence that the respondent company operates about 1,200 motor vehicles in the transportation of freight in interstate and intrastate (including intracity) commerce (R. 12). It does not use any horse-drawn vehicles in the conduct of its business (R. 8). It operates as a contract carrier of commodities, and serves shippers, connecting carriers and forwarding companies either (a) by leasing its trucks with drivers to shippers by the hour, day, week or year, or other period; (b) by making contracts with shippers to perform all trucking for a fixed period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit; (d) by distributing pooling cars; and (e) by rendering collection and delivery service, station or substation service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (R. 7).

The stipulation also contains the express factual recital that each vehicle of the respondent, during every single day of the year, carries on it, along with property which never leaves the city, property destined to points outside the city but within the state, as well as property destined to points outside the State (R. 9). [This fact is of crucial significance, because it establishes that the quantum of respondent's local operations is substantial.]

It was further stipulated that the respondent company had not complied with the provisions of the City ordinance in question, and had not secured licenses as provided

therein (R. 8). The stipulation also contains an express reservation by the respondent to object to the ordinance "on the ground that said Ordinance is void and of no legal effect because it is in conflict with the Constitution of the United States" (R. 4).

The executive vice president of respondent company testified that he did not know how much of respondent's operations were interstate, intrastate or intracity; that the company did not keep any records to determine the proportion of interstate as compared to intrastate and intracity operations; and that as far as the entire operations of the company were concerned, there was no way in which it could determine the proportion of intracity as compared to interstate and intrastate transportation (R. 12-13).

The same witness also testified that his company was not able to separate its interstate, intrastate and intracity operations; that it could not "without considerable hardship" withdraw from its interstate business and continue in its intrastate business; and that its interstate, intrastate and intracity business was not divisible (R. 11).

On the foregoing record, the trial court found the defendant not guilty (R. 2), entered final judgment on said finding (R. 2), and issued a certificate that the cause, and the final judgment therein, involved the question of the validity of a city ordinance (R. 2-3).

On direct appeal to the Supreme Court of Illinois, that court entered its earlier final judgment (subsequently vacated by this Court) affirming the judgment of the trial court (R. 29-30).

In view of respondent's admitted violation of the ordinance (R. 8), and of its express reservation of right to object thereto on the ground of its invalidity and unenforceability because in conflict with the Federal Constitu-

tion (R. 4), it follows that the trial court, in finding the defendant not guilty (R. 2) and entering judgment on said finding (R. 2), necessarily determined that the ordinance was violative of the commerce clause of the Federal Constitution. As further evidence and clarification of the ground of its decision, the trial court issued a certificate reciting that there was involved in the cause, and in the final judgment therein, the validity of a municipal ordinance (R. 2-3).

The Supreme Court of Illinois, in its main opinion, took a similar view of the basis of the trial court's decision, saying:

> "The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago" (R. 24).

In the Brief and Argument for Appellant, filed in the Supreme Court of Illinois, petitioner urged, among other errors, the following:

> "(6) The trial court erred in holding as a matter of law that the ordinance in question was in violation of the commerce clause of the Federal Constitution as an interference with or a burden upon interstate commerce" (R. 16).

In the Brief and Argument for Appellee, respondent contended in the Supreme Court of Illinois (a) that the "intrastate, interstate and local" operations of the respondent "cannot be separated and the ordinance is therefore in violation of the commerce clause of the Federal Constitution" (R. 19), and (b) that the ordinance in question "constitutes an interference with, and a burden on Interstate Commerce in violation of the Federal Constitution" (R. 19).

In its Reply Brief, petitioner urged that the ordinance, being confined to purely intracity transportation, neither interfered with nor burdened interstate commerce (R. 20), and, further, that a showing of inseparability between the interstate and intrastate operations of respondent was not sufficient to establish invalidity of the ordinance under the commerce clause of the Federal Constitution, there being no showing whatsoever that the imposition of the tax under the ordinance actually resulted in an undue burden upon respondent's interstate operations (R. 20-21).

In its Petition for Rehearing, petitioner expressly pointed out that the Supreme Court of Illinois had found inseparability to exist upon a mere showing of "mixed loads" (R. 30), and, further, had overlooked the controlling point that proof of inseparability, without more, was insufficient to invalidate the ordinance as violative of the commerce clause of the Federal Constitution, and that its decision was erroneous because there was no proof or even any attempt to show that the tax levied by the ordinance did in fact impose an undue burden upon respondent's interstate business (R. 31).

Upon consideration of our earlier petition for the writ of certiorari, this Court granted certiorari, vacated the judgment of the Supreme Court of Illinois, and requested that court to clarify the ground of its decision by showing whether its judgment rested on an adequate and independent state ground, or whether the decision of a Federal question was necessary to the judgment rendered (R. 37-38; 341 U. S. 913).

Pursuant to this Court's mandate, the Supreme Court of Illinois issued a clarifying opinion (R. 39-40), and again entered final judgment affirming the judgment of the trial court in favor of respondent (R. 41-42). This clarification sets at rest any doubt that might have existed as to the

basis of the earlier judgment of affirmance, because it specifically declares that the local tax levied by the municipal ordinance in question could not be applied as against the respondent because its intrastate and interstate operations were so inextricably intertwined that it could not continue in its interstate business alone if it chose to escape the tax by discontinuing its intrastate operations (R. 40).

Thus, it is respectfully suggested, the question of the validity of the ordinance in question under the commerce clause of the Federal Constitution was squarely involved in the cause, and was properly raised, presented and preserved for review throughout every stage of the proceedings; that, furthermore, the decision of that question by the Supreme Court of Illinois constituted the necessary basis of the final judgment of that court, and is properly before this Court for review on petition for the writ of certiorari.

The question whether or not a state taxing statute (or city ordinance) is in violation of the commerce clause of the Constitution of the United States is a Federal one, and within the review jurisdiction of this Court. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 21-22, 35 L. ed. 613; *Western Union Telegraph Co.* v. *Alabama State Board of Assessment*, 132 U. S. 472, 33 L. ed. 409.)

Several cases of more recent date in which this Court has assumed jurisdiction to review final judgments of state courts of last resort which have involved the question whether a state taxing statute (or city ordinance) was violative of the commerce clause of the Federal Constitution, are: (*Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 92 L. ed. 99; *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633; *Interstate Oil*

Pipe Line Co. v. *Stone*, 337 U. S. 662, 93 L. ed. 1613; *Capital Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. ed. 733; *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573.)

In *Brotherhood of Railroad Trainmen, et al.* v. *Terminal Railroad Association of St. Louis*, 379 Ill. 403 (affirmed in 318 U. S. 1), the Supreme Court of Illinois, said (p. 408):

> "The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter.".

The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois in that case (which involved the question of the validity of a regulation of the Illinois Commerce Commission) was invoked and sustained in 318 U. S. 1, 87 L. ed. 571.

That the Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business (R. 25), does not dissipate the error of that Court's ruling on the substantial Federal question whether the commerce clause of the Federal Constitution stands as a bar to the enforcement of the ordinance against respondent on a mere showing of inseparability without any evidence of undue burden. Nor can the Court's decision properly be regarded as merely embodying a ruling on the question of the sufficiency of the evidence to establish the existence of undue burden, since evidence of inseparability constitutes no evidence of undue burden. The question of the sufficiency of the evidence does not arise upon a total failure of proof. As this Court pointed out in *Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, the fact that

the intrastate and interstate phases of a business may be "inextricably intertwined" does not necessarily establish that a local tax upon the former casts an undue burden upon the latter.

In the case at bar, the quantum of respondent's local operations is not so negligible as to condemn the municipal levy as a tax upon interstate commerce disguised as an impost upon local business. On the contrary, each of respondent's vehicles carries some purely local freight "during every single day of the year" (R. 9). The ordinance is not attacked as prescribing a tax unreasonable in amount in the light of the annual volume of respondent's local operations. The ordinance is avowedly and actually limited in its coverage to purely local business, and casts no burden whatever upon interstate commerce because it neither purports to nor does it in fact levy any tax upon respondent's interstate operations. The indivisibility of respondent's intrastate and interstate business constitutes no ground for invoking the commerce clause as a bar to a fair and reasonable tax levied in respect of respondent's purely local business. (*Pacific Telephone & Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760.)

QUESTIONS PRESENTED.

(1) Whether proof that the same vehicles carry mixed loads (interstate as well as purely local freight) for the same or different shippers at the same time, and that it is inconvenient or impracticable to allocate specific vehicles for each type of operation or to keep separate records of the interstate and intrastate phases of the business or of the revenue derived therefrom is sufficient to establish a true case of "inseparability" under the decisions of this Court.

(2) As a corollary: Can persons engaged both in interstate and intrastate transportation escape local taxation upon their intrastate operations by the simple expedient of having the same vehicles carry such mixed loads for the same or different shippers at the same time, and by failing to keep separate records of their interstate and intrastate business or of the revenue derived therefrom?

(3) Assuming a sufficient showing of impossibility or impracticability of separation between the interstate and intrastate operations of the respondent company, is such inseparability sufficient to invalidate the municipal tax upon respondent's purely local business as an undue burden upon interstate commerce, in the absence of any proof that such local tax does or will actually result in unduly burdening respondent's interstate operations?

(4) Where the quantum of local business is sufficiently substantial, so that the municipal levy is fair and reasonable as applied thereto and not a disguised tax upon the interstate business, may the commerce clause be invoked as a bar to the local impost on the ground that the taxpayer's intrastate and interstate operations are so "inextricably intertwined" that the former can not be discontinued without also discontinuing the latter? Stated otherwise: Is not a fair and reasonable local tax upon local business unobjectionable under the commerce clause no matter how intermingled with the taxpayer's interstate business?

(5) Does a flat annual charge, reasonable in amount, levied in respect of each motor vehicle used by respondent in intrastate freight transportation become an undue burden upon interstate commerce by reason of the fact that the same vehicle is also used for interstate freight transportation, in the absence of any showing as to the relation,

percentagewise, between such flat annual charge and the annual operating revenue from each vehicle so taxed?

(6) Does a local tax, so reasonable in amount as not to constitute an undue burden upon interstate commerce, become obnoxious to the commerce clause of the Federal Constitution merely because such tax is in the form of a flat annual charge in respect of each vehicle used in intrastate commerce instead of measured by a percentage of the gross receipts from such local commerce?

(7) In view of a total absence of evidence of undue burden, should not the cause have been remanded for the taking of proof on that issue or, in the alternative, should not the ordinance have been accorded the presumption of validity and sustained, instead of held invalid on an inadequate record?

(8) In view of the stipulated fact that respondent's intrastate operations are substantial in amount (R. 9), does not the record conclusively establish the validity of the local tax, under the commerce clause, as applied to the respondent, and require a reversal of the judgment below?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Supreme Court of Illinois that a showing of inseparability between the interstate and intrastate phases of respondent's business was sufficient to invalidate the municipal tax upon its local business as an undue burden upon interstate commerce, without any showing whatever that such local tax actually produced such a result, is not in accord with the applicable decisions of this court.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, this Court sustained the validity of a local taxing statute as against the objection that it was obnoxious to the commerce clause of the Federal Constitution, notwithstanding that it was found that practical considerations would prevent the taxpayer from abandoning its intrastate business in order to escape the tax without also withdrawing from its interstate business, and that its interstate and intrastate operations were "inextricably intertwined" (p. 411). This Court there said: "No decision of this Court lends support to the proposition that an occupational tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable" (pp. 415-416). This Court further pointed out that "if it [the local tax] burdens interstate commerce at all, it does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards.' * * * The alleged indirect tax must be judged by its practical operation" (p. 413). (Brackets, and words enclosed therein, supplied.)

This Court then went on to examine the evidence as to gross operating revenue from each class of business, the relation between the two, and the economic impact of the tax upon each type of operation as well as upon the taxpayer's business as a whole; concluded that no undue burden on interstate commerce was shown; and sustained the validity of the tax under the commerce clause of the Federal Constitution notwithstanding an unavoidable inseparability between the taxpayer's interstate and intrastate operations (pp. 417-420).

In the case at bar there is no evidence whatever as to respondent's gross or net annual operating revenue, whether from interstate, intrastate, or total business, either per vehicle or as a whole. Hence there is no basis in the record for the conclusion reached by the Supreme Court of Illinois that the tax prescribed by the ordinance in practical effect did or would unduly burden respondent's interstate operations.

The crucial error of the Supreme Court of Illinois in the decision here sought to be reviewed is that it held the mere fact of inseparability to be sufficient for invalidation of the ordinance under the commerce clause, without requiring any showing as to whether or not the local tax did in fact constitute an undue burden upon interstate commerce. This, we respectfully submit, is directly contrary to the decision of this Court in *Pacific Telephone and Telegraph Company* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760.

The only material distinction between that case and the case at bar is that, there, the local taxing statute was measured by a percentage of gross receipts from intrastate operations, whereas the ordinance here involved prescribes a flat annual charge in respect of each vehicle used in intracity transportation.

The Supreme Court of Illinois, however, did not rest its decision that the ordinance was invalid under the commerce clause upon any distinction between a flat annual charge and a tax based upon gross receipts, but purely and solely upon the factor of inseparability between respondent's interstate and intrastate operations (R. 29, 39-40).

There is nothing in a flat annual charge (as distinguished from a tax graduated according to gross receipts or other variable factor) which is inherently offensive to the commerce clause. This Court has frequently sustained such flat fees imposed by local law as not constituting forbidden burdens upon interstate commerce. (*Morf* v. *Bingaman*, 298 U. S. 407, 412, 80 L. ed. 1245; *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs. of Montana*, 332 U. S. 495, 506, 92 L. ed. 99; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. ed. 1053.) These same cases likewise sustain the measure and amount of the tax prescribed by the ordinance in question as fair and reasonable; nor, indeed, can the respondent here contend otherwise in the absence of any showing as to the relation between the amount of the annual tax and the amount of its annual revenue from local operations.

We are not unmindful of the general proposition that a state may not exact a tax for the privilege of engaging in interstate commerce, except as reasonable compensation for necessary and valuable services rendered, such as the use of state highways or other local facilities. The ordinance here involved scrupulously observes this limitation by expressly restricting its coverage to intracity operations. Hence the decisions of this Court invalidating local statutes or ordinances which attempted to impose taxes indiscriminately upon *all* vehicles, whether engaged exclusively in interstate commerce, or engaged exclusively in intrastate commerce, or engaged in both classes of commerce, are not germane to the present inquiry.

In *Pacific Telephone and Telegraph Co.* v. *Washington Tax Commission*, 297 U. S. 403, 80 L. ed. 760, this Court distinguished *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. ed. 833, which involved a flat annual license fee for each vehicle, on the ground that there the ordinance levied the tax indiscriminately on *all* busses, whether engaged exclusively in interstate commerce, or engaged exclusively in intrastate commerce, or engaged in both classes of commerce. This Court pointed out that the license tax was held void because Sprout could not escape payment of the tax by confining himself to interstate business, since the scope of the ordinance reached even those facilities which were employed exclusively in interstate commerce (pp. 416-417).

Similarly, in two other cases involving city ordinances imposing flat annual charges upon motor freight vehicles, this Court held such local levies void under the commerce clause as applied to vehicles engaged exclusively in making hauls, which, although intracity, constituted segments of interstate transportation, so that the tax was actually a direct impost upon interstate commerce. (*Barrett (Adams Express Co.)* v. *City of New York*, 232 U. S. 14, 31, 32, 34-35, 58 L. ed. 483; *Platt (United States Express Co.)* v. *City of New York*, 232 U. S. 35, 58 L. ed. 492). Distinguishable on identical grounds is the case of *People of the State of New York* v. *The Horton Motor Lines*, 281 N. Y. 196, 22 N. E. (2d) 338.

The controlling principle which would appear to run through the decisions of this Court on this subject is that the local statute or ordinance will be upheld as valid where it is strictly confined to local business, but will be held invalid only if it applies indiscriminately to all business whether local or interstate. We are here speaking, of course, of local occupation or privilege taxes, since local taxes imposed as reasonable compensation for the use of

local highways or other facilities have been upheld even where imposed directly upon interstate business. (See the chart of decisions listed in the Appendix to the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Jackson joined in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 561; 94 L. ed. 1053, 1066).

In the following cases, this Court sustained the validity of local tax legislation because strictly confined to local business. (*Osborne* v. *Florida*, 164 U. S. 650, 654, 655; 41 L. ed. 586; *Pullman Company* v. *Adams*, 189 U. S. 420, 422; 47 L. ed. 877; *Ewing* v. *City of Leavenworth*, 226 U. S. 464, 468-469; 57 L. ed. 303.)

In the following cases, this Court held local tax legislation to be invalid because applying indiscriminately both to local and interstate business. (*Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; 32 L. ed. 311; *Crutcher* v. *Kentucky*, 141 U. S. 47; 35 L. ed. 649; *Williams* v. *Talladega*, 226 U. S. 404, 419; 57 L. ed. 275; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 388-389, 390, 393; 79 L. ed. 934.)

In *Leloup* v. *Port of Mobile*, 127 U. S. 640; 32 L. ed. 311, which is frequently cited as a leading case on the subject, the State of Alabama imposed an annual license tax of $225 "on telegraph companies", without restricting it to telegraph companies doing an intrastate business or to the intrastate business of companies doing both local and interstate business. This Court held the tax invalid as a local impost upon the privilege of doing interstate commerce, saying (p. 647):

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient

modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

No such constitutional infirmity is present in the ordinance here involved which, in terms as well as by virtue of its construction by the Supreme Court of Illinois, applies only to vehicles employed in purely local transportation, i. e., where the point of origin and the point of destination are both within the corporate limits of the same city. The tax is levied solely in respect of such intracity operations; the amount exacted is not increased because of the interstate business done; and vehicles operated exclusively in interstate transportation are not subject to the tax.

The question still remaining is whether the local tax constitutes an undue burden upon interstate commerce because the respondent cannot feasibly discontinue its purely intrastate operations and still carry on its interstate business. The proof is very meager upon this point; but, assuming that the record establishes that the respondent would have to cease business altogether if it gave up its local business (R. 27), does that circumstance render the respondent immune from a fair and reasonable local tax upon its purely local business shown to be substantial in amount? This is the pivotal issue in the case, and we believe that this Court has answered the question in favor of the validity of such a tax under the commerce clause. According to our appraisal of the decisions of this Court on the subject, a local tax upon purely local business will not be held violative of the commerce clause, provided it does not discriminate against interstate commerce, is fair and reasonable in amount, and is not increased by the fact that interstate commerce is also engaged in; and the fact that the taxpayer needs the local business in order to be

the tax violates the constitution of the United States and imposes a burden on interstate commerce. Both parties further argue as to the validity and invalidity of the ordinance in question.

It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago* v. *Hebard Express and Van Co.*, 301 Ill. 570.

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid *per se*. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, it was said, "'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce." Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense.

As contended by the city, there is no question but what a license tax may be imposed upon the defendant for its intracity business. In *Osborne* v. *Florida*, 164 U. S. 650, a Florida statute was involved, imposing an annual license tax on all express companies doing business in the State. The Supreme Court of Florida has construed the statute as not applying to interstate business, but only to local

business, intrastate in character. The Supreme Court of Florida held the statute to be valid and the United States Supreme Court affirmed this holding, pointing out that the construction of the statute by the Supreme Court of Florida, as applying only to intrastate business, was binding upon it and would be accepted by it. The case is authority for the rule that a statute so construed does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in character.

However, the mere operation of trucks by the defendant "within the city" is not sufficient to determine the issues here. The legal effect of such operation must be considered.

As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant. In addition to arguing that the statute itself provides only for taxation upon persons transporting property "within the city" and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply.

It is only when a separation, in fact, of intrastate and interstate business exists that a like separation may be recognized between the control of the State and that of the nation. (See *Osborne* v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420.) The city argues, however, that no inseparability has been shown and that the defendant has not met the burden of proof in this regard. The burden is on him who asserts that, although actually within, the traffic is legally outside the State; un-

able to carry on its interstate business, far from being an argument against the validity of the local tax, would seem to furnish an added ground for not permitting the taxpayer to escape the local tax upon his purely local business.

Some of the recent decisions of this Court involving the question of the validity under the commerce clause of local taxing legislation, while not directly in point, are quite illuminative of this Court's approach to the problem.

In *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 93 L ed. 1613, this Court sustained a state privilege tax upon the transmission of oil by pipeline from producing points within the State to loading racks adjacent to railroads within the State, although accompanied by shipping orders from the producer or owner directing that the oil be transported to out-of-state destinations. Four members of this Court held the tax not violative of the commerce clause irrespective of whether or not the business taxed was interstate commerce, because the tax was not discriminatory, could not be repeated by any other state, did not require apportionment since the business taxed was all of the same nature, i.e., the transmission of oil within the State though destined to points outside the State; and did not purport to cover interstate activities carried on beyond the State's borders (337 U. S. at p. 668). One member of the Court concurred on the ground that the activity taxed was intrastate, i.e., operating a pipeline in intrastate commerce (337 U. S. at pp. 668-669). Four members dissented on the ground that the transmission of the oil to gathering points within the State for out-of-state shipment was wholly and entirely interstate commerce, the doing of which could not, under the commerce clause, be made subject to a local privilege tax (337 U. S. at p. 669). It is significant to note, however, that the dissenting opinion nevertheless declares (337 U. S. at p. 679):

"Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise privilege or excise tax on the former is of course permissible."

The doctrine of the foregoing decision goes beyond what is necessary to sustain the validity under the commerce clause of the tax imposed by the ordinance in the instant case. Here, the tax is strictly confined to respondent's local business which constitutes a substantial portion of respondent's total operations, and there is no attempt to tax any interstate operations at all.

In the recent case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. ed. 573, a state tax on corporations, measured by the net income from business transacted within the State, was held invalid under the commerce clause as applied to a foreign corporation engaged exclusively in the interstate trucking of freight. The majority opinion pointed out that this was a local tax laid directly upon interstate commerce because the company was not engaged in intrastate commerce to any extent whatever. The Court said (pp. 606, 607-608):

"The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation."

* * * * * * *

"It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State."

The Court then made the following significant declaration (pp. 609-610):

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. [The emphasis is the Court's own.]

* * * * * * *

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate

and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate." (Citing cases.)

In the dissenting opinion, (in which three Justices joined), it was urged that the tax was valid because "nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce" (p. 610). "Hence," said the dissent, "if appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce" (pp. 610-611).

In the case at bar, the intrastate activity of the respondent consists of more than a mere "iota"; it is considerable and substantial, since each of respondent's vehicles carries some purely local freight "during every single day of the year" (R. 9).

Nor does the fact that the proportion of intracity and interstate business may not be the same for each vehicle, or that it varies during different periods of the year in the use of the same vehicle, have any material bearing upon the question. As this Court has said in *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. • • • One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." (295 U. S. 285, at p. 289).

That the tax here is a flat annual charge per vehicle, rather than a tax measured by a percentage of gross receipts from local operations, does not render it any more burdensome to the respondent. Indeed, a tax based upon such latter formula would introduce insuperable complexities in its administration, as well as obstacles to the taxpayer's attempt to comply therewith, which are obviated by the present flat annual charge upon each vehicle. According to the record here, respondent's executive vice president testified that respondent "does not keep any record to determine the proportion of interstate as compared to intrastate and local operations" (R. 12), and that "there is no way in which we can determine the proportion of local transporation as compared to interstate and intrastate" (R. 13). The Stipulation of Facts recites that there are more than 3,000 motor freight carriers in the City of Chicago "similarly situated" (R. 10). The City of Chicago was thus confronted with a difficult choice as to method, and it finally concluded that a flat annual tax, reasonable in amount, upon each vehicle used in intracity transportation, and in accordance with its load-carrying capacity, was a fair and legally permissible formula.

This Court has recognized the difficulties confronting States and municipalities in gearing local transportation taxes to relevant factors, and has declared that the validity of a local tax should be judged by its result, not its formula; that the tax will be sustained if not shown to be unreasonable in amount (*Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 545; 94 L. ed. 1053); and that the burden of proof in this respect is upon a carrier who challenges the validity of the tax (339 U. S. 542, at p. 548).

Respondent has not shown that the moderate schedule of flat annual charges per vehicle based upon its load-carrying capacity is in excess of a reasonable fee for the privilege of its use in intracity commerce. Hence, no portion of the tax

constitutes a charge for the privilege of using the vehicle in interstate commerce. The ordinance, as construed, disclaims any such purpose, and the record wholly fails to show that its application to respondent will produce any such unconstitutional result.

II.

This Court has repeatedly declared that it will not suffer local revenue laws to be invalidated as obnoxious to the commerce clause of the Federal Constitution upon a record wholly lacking in proof upon the vital issue of undue burden, but will either remand the cause to the state court for the taking of evidence thereon, or will sustain the legislation under the doctrine of presumptive validity.

In the case at bar, there can be no difference of opinion as to the inadequacy of the record to support the judgment of the Illinois Supreme Court, since there is a complete lack of evidence on the issue of undue burden. Manifestly, therefore, the ordinance either should have been sustained on the doctrine of presumptive validity or, in the alternative, the cause should have been remanded for the taking of evidence on the controlling issue whether the enforcement of the ordinance against the respondent does or will in fact impose an undue burden upon its interstate business. Instead, the Supreme Court of Illinois held the ordinance void and unenforceable as applied to the respondent without any evidence on the crucial issue of undue burden.

Where the evidence is "too inexplicit to supply the answers", and "the needed information is neither accessible to judicial notice nor within its proper scope", the case should be sent back to the lower court for further hearing in order "to avoid constitutional adjudication without adequate knowledge of the relevant facts". (See the dissent-

ing opinion of Mr. Justice Frankfurter in *Hood* v. *DuMond*, 336 U. S. 525, at p. 574, 93 L. ed. 865, at p. 893, and cases therein cited.)

We do not concede, however, that the record is not sufficient to sustain the validity of the ordinance under the commerce clause as applied to the respondent, since it is abundantly clear from the evidence that respondent was engaged in purely local business to a substantial extent, and the ordinance imposes the tax only in respect of such purely local operations.

III.

The question of the validity of the city ordinance here involved under the commerce clause of the Federal Constitution is of far-reaching importance to all state and municipal taxing bodies.

The Supreme Court of Illinois felt constrained to invalidate the ordinance in deference to the Federal power to prevent or remove obstructions to interstate commerce, notwithstanding that the ordinance represents a species of important revenue legislation enacted pursuant to an express statutory grant to municipalities (R. 4).

The record shows that the respondent operates about 1,200 motor vehicles in its business (R. 12). Each of these is operated daily in some intracity transportation (R. 9). There are more than 2,000 individuals, firms, or corporations who are engaged in the City of Chicago in the transportation of freight by motor vehicle in intracity commerce (R. 10). The aggregate number of vehicles that would be subject to the tax under the ordinance is not shown, but it is clear even from this meager record that the amount of annual revenue collectible thereunder is not inconsiderable.

Apart from the quantum of the revenue involved, the question (squarely presented in this case) whether a local taxing statute (or ordinance) may properly be invalidated as obnoxious to the commerce clause of the Federal Constitution, on a record completely devoid of proof that the ordinance imposes an undue burden upon interstate commerce, would clearly seem to be of sufficient importance to all state and municipal taxing bodies to warrant a clear and unequivocal declaration thereon by this Court. For if inseparability alone be decisive of invalidity, then much local business can escape local taxation simply by integrating itself with interstate operations. This Court has already declared that such intermixture does not suffice as an avenue of escape from local taxation, especially where the purely local business constitutes a substantial portion of the taxpayer's total operations.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be allowed, and that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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APPENDIX "A".

(Text of Opinion of Supreme Court of Illinois.)

Docket No. 31312—Agenda 16—March, 1950.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. Justice Fulton delivered the opinion of the court:

This cause is heard here on direct appeal from a judgment of the municipal court of Chicago, finding the Willett Company, hereinafter referred to as defendant, not guilty in an action brought by the city of Chicago, which charged said defendant with engaging in the business of a carter within the city of Chicago without first having obtained or paid for a license therefor, in violation of chapter 163, Municipal Code of Chicago.

The cause was heard by the court without a jury. The parties filed a stipulation which, with certain testimony of the executive vice-president of the defendant company, constitutes the record in the cause. The trial court has certified that the validity of a municipal ordinance is involved.

Chapter 163 of the Chicago Municipal Code relates to carters and provides, in brief, that any dray type of vehicle driven or employed for the purpose of transporting or conveying property and merchandise within the city for hire or reward shall be deemed a cart within the meaning of the chapter, whether the vehicle be employed or hired from any public stand, public way, barn, garage, office or other place, or whether it be hired for the day, week, month or year. A license tax is imposed by the ordinance for each cart operated or controlled by every carter according to established fees and schedules.

The foregoing section as passed repeals the prior public carters' ordinance as well as the furniture movers ordinance.

The defendant is an Illinois corporation, with its offices in Chicago, and was engaged in the business of transporting property by motor vehicles for hire in the city of Chicago. It operates as a contract carrier of commodities by motor vehicle from points and places within the State of Illinois, to points and places in the States of Indiana and Wisconsin. It further carries property within the city of Chicago from point to point under contract with various firms and other interstate and intrastate carriers entering the city. It holds itself out to serve the public and connecting carriers and forwarding companies generally up to the limit of its capacity, either (a) by leasing trucks with drivers to shippers by the hour, day, week or year or other period, (b) by making contracts with shippers to perform all trucking for a fixed period, (c) by giving occasional service or handling single shipments in local cartage for any shipper at a rate per hundred pounds, per ton, per piece, or other unit, (d) by distributing pooling cars, and (e) by rendering collection and delivery service, station or substation service, for rail, water and highway motor carriers and forwarding companies, either under contract or on some other basis. It was further stipulated that the motor vehicles operated by the defendant company in the course of a day's business would transport property from points within the city of Chicago to other points within the city of Chicago, from points within the city of Chicago to other points within the State of Illinois outside the city and from points in Chicago to other States surrounding Illinois and return. The defendant did not comply with the provisions of the carters ordinance, arguing that the ordinance was void and of no legal effect because it is in

conflict with the constitution of the United States; it is in conflict with the constitution of Illinois; it is in conflict with section 25-31 of the Revised Cities and Villages Act; and it is in conflict with the Illinois Truck Act of 1939, as amended.

The finding of the trial court for the defendant is apparently based on the ground that the application of the ordinance to the defendant carrier's business would create a burden upon interstate commerce and that, therefore, the defendant is exempt from the provisions of the carters ordinance of the city of Chicago.

The argument of the city of Chicago, the appellant here, is to the effect that by the terms of the ordinance, the license fee is restricted to carters doing business "within the city" and that the natural meaning of those words restricts the ordinance to intracity business and it cannot apply to interstate commerce. In support of this construction, appellant cites *Pacific Express Company* v. *Seibert*, 142 U. S. 339, and related cases. It further argues that the mere fact that the defendant company is engaged in interstate commerce, as well as intrastate and intracity, does not prevent the city of Chicago from imposing an occupation tax upon the defendant with respect to the purely intracity operations in which the defendant is admittedly engaged. To support this view, they cite cases such as *Osborne* v. *Florida*, 164 U. S. 650, *Pullman Co.* v. *Adams*, 189 U. S. 420, and like cases.

The defendant, on the other hand, cites *People* v. *Horton Motor Lines*, 281 N. Y. 196; *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370, and *Sprout* v. *South Bend*, 277 U. S. 166, and similar cases for the proposition that the State or municipality cannot tax interstate commerce and, in situations such as the one before the court,

less the interstate character is established, locality determines the question of jurisdiction. *Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21.

The only evidence in this record is that of Howard L. Willett, Jr., who is the executive vice-president of the defendant company, and who stated on the stand that his company engaged in interstate, intrastate and local freight in the city of Chicago. It is not clear from the testimony or the questions asked of Willett whether or not he was familiar with the legal meaning of the term "intercity freight." It is apparent that the Willett Company operates from Chicago to surrounding States and in that manner engages in interstate commerce. They also engage as a contract carrier with other carriers coming into the city of Chicago from outside the State of Illinois. Whether or not by intercity operation Willett meant only that his trucks operated within the city of Chicago is another thing. The record is silent on that point.

He did testify that it was not possible to separate the intrastate freight from the interstate freight and the intercity freight hauled by the defendant. He further stated that defendant could not keep records of the shipments it made each day within the city of Chicago as to interstate, intracity or intrastate character.

It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every

load the three types of property are so intermingled as to be impossible of separation. It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance. The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contracts carriers in the city of Chicago.

The cross-examination by the city of Chicago did not counteract the statements of this witness, and his statements as to nonseparability remained unchallenged in the record. All of the trucks, over 1200 of them, are engaged in the type of work which has been described. It was evident that the type of contracts the defendant has with other companies deal mainly with other carriers. The defendant has contracts with the Pennsylvania Railroad, Acme Fast Freight, Air Cargo, Ryerson Steel, U. S. Steel, Youngstown Steel, H. J. Heinz Company, Standard Brands Company, Glidden Company and others of that nature. All of these companies have either offices or plants in the city of Chicago.

On cross-examination the witness testified that insofar as the operations of the defendant were concerned, there was no possible way in which they could determine the proportion of local transportation as compared to intrastate and interstate, but he did state that in all the operations, every truck had some of all types of freight on it.

In view of the uncontradicted testimony in the record, it would appear that the defendant is not able to separate its intracity business from its interstate business, nor can it keep records of such business, nor can it continue in any

one of the operations without giving up its entire business. In other words, it needs all of its business to keep in operation.

In *Pullman Co.* v. *Adams,* 189 U. S. 420, a Mississippi statute was involved, imposing a privilege tax on each sleeping-car company carrying passengers from one point to another within the State. The proof showed that the defendant company carried passengers into Mississippi from points outside the State, or out of Mississippi from points within the State, but that the same cars also carried passengers from point to point within the State. It was contended that the tax was invalid as a burden upon interstate commerce. The United States Supreme Court affirmed the judgment of the State court, holding the tax valid, saying that the defendant had the right to choose between what points it would carry persons and, therefore, the right to give up the carriage of passengers from one point to another within the State. The court further said, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The distinguishing factor in that case and in the situation before us is that the record is clear and uncontroverted that the defendant herein is not free to renounce. The record is uncontradicted that the defendant cannot engage in any one portion of its business without the other.

In *Sprout* v. *South Bend,* 277 U. S. 166, the Supreme Court of the United States, considering an ordinance of the city of South Bend imposing a license on motor busses, stated, "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could

discontinue the intrastate business without withdrawing also from the interstate business." The evidence in the instant cause makes this language applicable to the case here.

The case is similar in some respects to *People* v. *Horton Motor Lines, Inc.*, 281 N. Y. 196, 22 N. E. 2d 338. That case involved an interstate motor carrier which operated a fleet of trucks within the city of New York to deliver and pick up freight to and from its New York terminal or to other shippers within the city. The question involved was whether the public carter's ordinance could be applied to the defendants' small trucks which engaged primarily in interstate commerce, although all operated "within the city." In determining that the defendant was not subject to the carter's ordinance, the court cited *Northern Pacific Railway Co.* v. *Washington ex rel. Atkinson*, 222 U. S. 370. In that case it was said, "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train."

The language of this last cited case is applicable here. While the defendant may have intracity loads in part upon its trucks, it is clear that every load combines intrastate and interstate property as well. The incidental carrying of loads within the city does not make the defendant subject to the license tax here. The defendant cannot separate its loads, nor can it discontinue any part of the service. Under these facts, we must conclude that the defendant is engaged

in interstate commerce within the meaning of that term and is not subject to the license tax here in question.

Under the view we have taken in this cause, it is not necessary to consider the other arguments made by the appellant and appellee. For the reasons stated herein, the judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

THOMPSON, C. J. and CRAMPTON, J., dissenting.

APPENDIX "B".

(Text of Order of Supreme Court of the United States, granting certiorari, etc.)

No. 493. October Term, 1950.

City of Chicago, Petitioner, v. The Willett Co., Respondent.

"April 23, 1951. Per Curiam: The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for clarification by that court to show, in light of *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. ed. 920, 60 S. Ct. 676; *State Tax Com.* v. *Van Cott*, 306 U. S. 511, 83 L. ed. 950, 59 S. Ct. 605, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered."

[Reported in 341 U. S. 913, 95 L. ed. 1349.]

APPENDIX "C".

(Text of Clarifying Opinion and Decision of Supreme Court of Illinois, pursuant to Mandate of Supreme Court of the United States upon entry of order granting certiorari, etc.)

[Rendered and Filed December 17, 1951.]

Docket No. 31312.

The City of Chicago, Appellant, v. The Willett Company, Appellee.

Mr. JUSTICE FULTON delivered the opinion of the court:

Pursuant to the order entered by the United States Supreme Court in the cause of *City of Chicago* v. *The Willett Co.* (No. 493, October term, 1950, of said court,) requesting a clarification of our opinion in the same cause, reported in 406 Ill. 286, as to whether or not a decision of a Federal question was necessary, the basis for the opinion in said cause is as follows:

Osborne v. *Florida,* 164 U. S. 650, and *Pullman Co.* v. *Adams,* 189 U. S. 420, hold that only when a separation, in fact, of intrastate and interstate business exists a like separation may be recognized between the control of the State and that of the nation to apply a tax such as proposed here. The burden of proving inseparability is on him who asserts that, although actually within, the traffic is legally outside the State; that unless the interstate character is established, locality determines the question of jurisdiction. (*Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21.) *Sprout* v. *South Bend,* 277 U. S. 166, holds that in order that the fee or tax be valid it must appear that it is imposed solely on account of the intrastate business;

that the amount exacted does not increase because of the interstate business done; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

The sole evidence in the cause, to which fact situation the above rules of law had to be applied, was to the effect that the Willett Company is not able to separate intrastate from interstate and inter-city business, nor can it keep records of such business or degrees of business, nor can it continue in any one of its operations without giving up its entire business. The city did not contradict, oppose or challenge this evidence either by introducing evidence in opposition thereto or by cross-examining the witnesses to challenge their veracity.

Our decision is that the Chicago carters ordinance is valid, but, in the light of the rules of the foregoing cases, could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from an application of the license tax.

The judgment of the municipal court of the city of Chicago is affirmed.

Judgment affirmed.

APPENDIX "D".

(Text of Ordinance involved.)

Be it ordained by the City Council of the City of Chicago:

Section 1. This Ordinance shall be known as Chapter 63 of the Municipal Code of Chicago, and shall be designated as the Carters Ordinance:

Chapter 163

Carters

163-1. Every express wagon, cart, truck, dray, wagon, utomobile, autocar, auto truck, or other vehicle of ny kind, either drawn by animal or self-propelled, hich shall be operated, driven or employed for the purose of transporting or conveying bundles, parcels, furniure, trunks, baggage, goods, wares, merchandise, produce, r other articles within the city for hire or reward, shall be eemed a cart within the meaning of this chapter, whether uch vehicle is employed or hired from any public stand, ublic way, barn, garage, office, or other place in the city y the day, week, month or year.

Any person engaged in the business of operating a cart hall be deemed a carter.

163-2. An annual license tax is imposed upon every arter for each cart operated or controlled by him, accordng to the following schedule:

Horsedrawn vehicle—

One-horse	$ 2.75
Two-horse	5.50
Three-horse	6.25
Four-horse	11.00
Six-horse	13.75

Automotive vehicles—

Capacity not exceeding two tons	$ 8.25
Capacity exceeding two but not exceeding three tons	11.00
Capacity exceeding three but not exceeding four tons	13.00
Capacity exceeding four tons	16.50

No license shall issue except upon payment of the full annual license tax.

It shall be unlawful for any person to engage in the business of a carter without first having paid such license tax.

163.3. An application shall be made in conformity with the general requirements of this code relating to applications for licenses and such application shall include a statement of the number of vehicles with such details of description and on such forms as may be required by the City Collector.

The City Clerk shall deliver to each carter, upon payment of the license tax herein imposed, a license emblem which shall bear the words "carter" and the numerals designating the year for which such license tax has been paid. It shall be the duty of the carter to affix the license emblem in a conspicuous place on the vehicle. It shall be unlawful for any person to drive a cart which does not bear such license emblem.

163-4. Any person violating any of the provisions of this chapter shall be fined not less than fifty dollars nor more than two hundred dollars for each offense and each day such violation shall continue shall be regarded as a separate offense.

Section 2. Chapter 163, entitled "Public Carters" as it as heretofore appeared in the Municipal Code of Chicago s hereby repealed.

Section 3. Chapter 132, entitled "Furniture Movers" of he Municipal Code of Chicago, is hereby repealed.

Section 4. This Ordinance shall be in force and effect pon passage and due publication.

(*Journal of the Proceedings of the City Council of the ity of Chicago, Illinois, for January 14, 1949, page 3679.*)